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Quemada v. Arizmendez Appellant's Reply Brief Dckt. 38831

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IN THE SUPREME COURT OF THE STATE OF IDAHO

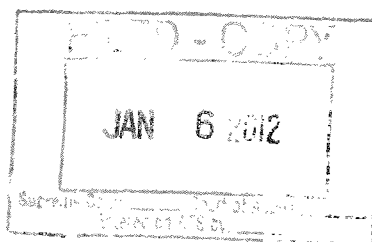
IN THE MATTER OF THE ESTATE OF
RICHARD ENRIQUEZ ORTEGA

Supreme Court Docket No. 388341-2011
Owyhee County Docket No. CV-10-01389

Danielle Quemada, Personal Representative
of The Estate of Richard Enriquez Ortega,
Petitioner-Appellant,

vs.

EFREN A. ARIZMENDEZ,
GILBERT ACOSTA, JR.,
Respondents.



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District for Owyhee County.

Honorable Thomas J. Ryan, District Judge, presiding.

Douglas E. Fleenor, Attorney for the Appellant
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PO Box 917
Caldwell, ID 83606

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PO Box 917
Caldwell, ID 83606

Supplemental Argument

a. Hearsay Evidence

Respondents seek to discredit evidence because it may be hearsay. However, Celia is a disclosed witness and so her testimony is expected at trial.

Statements from the decedent are exception to hearsay I.R.E. 804, because he is unavailable and made statements regarding his personal, family matters. Further, under Idaho Statute § 9-202, witnesses who are non-parties to the lawsuit may testify as to these statements from decedent. Since the statements in evidence are to non-party witnesses, statements from decedent are not hearsay.

b. The District Court erred by not considering all of the evidence in the record.

Petitioner did not ask the court to “scour” the record, only that the court consider the evidence brought to its attention, which is the rule in *Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009). In addition, *Gmeiner v. Yacte*, 100 Idaho 1, 492 p.2d 57 (1979), held that when a transaction appears to depart from a “natural and expected” result, the entire transaction should be closely scrutinized by the Court.

c. The District Court erred in failing to recognize a presumption of undue influence?

The undue influence on decedent was imposed by Celia and her son, Gilbert, together. As a married couple, a confidential relationship is presumed between Celia and decedent. The undue influence by Celia benefitted her son, Gilbert.

The district court made the improbable inference that decedent intended to gift his house

to Efren's daughter, by deeding it to Gilbert.

However, the real error at the district court level was using contested facts to rebut the presumption of undue influence.

Respondents claim undisputed evidence refutes the first element, a grantor subject to influence. A person in a confidential relationship, in this case marriage, is evidence for being subject to influence.

Although decedent had purchased two homes over his lifetime, the fact that Celia had owned and operated several rental homes in the past few years indicates an unequal expertise in real estate transactions. A transaction involving decedent, with scant experience, and Celia with knowledge and expertise in real estate transactions, is evidence that decedent was subject to Celia's influence.

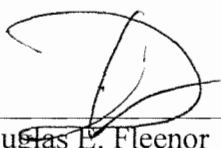
Further, there are competing facts as to whether decedent intended to get Celia's name off his property so he could pass it to his children, or so he could pass it to Celia's granddaughter. The district court erred in accepting the moving party's fact as a basis of support for finding the grantor not subject to influence.

Finally, there are competing facts as to whether decedent asked to be taken to the title company, or whether the idea was initiated by Celia. Again, the court erred in accepting the moving party's fact as a basis for finding the grantor was not subject to influence.

Secondly, Respondents' assert that they provided evidence to refute the fourth element, a result indicating undue influence. This claim is based on the contested issue of the intent of the decedent. However, the result was the unnatural and unexpected result of nearly his entire estate

passing to a granddaughter of recent ex-wife, instead of his own children.

Respectfully submitted this 26th day of January, 2012.



Douglas E. Fleenor
Attorney for Personal Representative

CERTIFICATE OF SERVICE

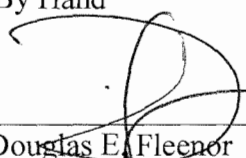
I, the undersigned, certify that on the 26th day of January 2012, I caused true and correct copies of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Idaho Appellate Rules, to the following person(s):

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Douglas E. Fleenor

